84-1975

Office - Supreme Court, U.S.
FILED
JUN 19 1985
ALEXANDER L. STEVAS
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No.

In The Supreme Court of the United States

October Term, 1984

WILLIAM CASTALDI,

Petitioner,

-vs.-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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I. QUESTIONS PRESENTED:

A. In this prosecution for a Narcotics Conspiracy i.e., 21 U.S. Code Sections 812, 841(a)(1), 841(b)(1)(A) and 846, was petitioner's right of silence under the Fifth Amendment to the United States Constitution violated when the trial court ruled that the Government could introduce evidence of petitioner's failure to file income tax returns for specific years, notwithstanding uncontroverted evidence that petitioner for these years delivered a written statement to the Internal Revenue Service that he is claiming the right of silence (Fifth Amendment) in respect to the non-filing of these returns?

B. Must an affirmative written statement fully indicating claim of the right of silence (Fifth Amendment) in order to be effective be asserted solely on a tax return i.e., exalting form over substance, despite Internal Revenue Service Notice No. 609, which specifically provides that you must file a return or statement for any tax you are liable for?

C. Can the threshold requirement under Rule 801(d)(2)(E) be satisfied solely based on participation in a cryptic telephone conversation, interpreted by a Drug Enforcement Agent explaining argot generally utilized without any basis with regard to the petitioner for its specific application herein?

LIST OF PARTIES:

Petitioner, WILLIAM CASTALDI, and co-defendants DOMINIC TUFARO, RONALD MARRAZZO and FREDERIC SINDONA were tried in the United States District Court, Southern District of New York and appealed to the Second Circuit United States Court of Appeals.

THE PRINCIPAL CONSTITUTION AND STATUTORY PROVISIONS INVOLVED:

Fifth Amendment to the Constitution.
Sixteenth Amendment to the Constitution.
Title 26 U.S. Code §7203, 7602(2), 7604 and 6020(b)(1).
Title 21 U.S. Code §812, 841(a)(1), and 841(b)(1)(A).
Rule 801(d)(2)(E) of the Federal Rules of Evidence are set forth in Appendix C infra.

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

WILLIAM CASTALDI,

Petitioner,

-vs.-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM CASTALDI, prays that a Writ of Certiorari issue to review a denial of a Petition for a rehearing in banc dated April 22, 1985 (Appendix A infra) of a final Judgment and Order of the United States Court of Appeals for the Second Circuit entered March 5, 1985 (Appendix B infra) which affirmed the Judgment of the United States District Court, Southern District of New York, entered on May 1st and May 14, 1984 convicting him of a narcotic conspiracy under 21 U.S.C. 846 to violate 21 U.S.C. 812, 841(a)(1) and 841(b)(1)(A).

As a consequence CASTALDI was sentenced to a seven year prison term, and a maximum committed fine, the said term to run consecutively to a separate sentence of five years imposed by the Hon. MORRIS B. LASKER, United States District Court, Southern District of New

York, following a separate and distinct Judgment against CASTALDI.

THE OPINION OF THE COURT BELOW

The opinion of the Court below, namely the United States Court of Appeals for the Second Circuit, affirming the Judgment of Conviction is set forth in Appendix A, infra, as aforesaid.

JURISDICTION

The Order of the Judgment of the United States Court of Appeals for the Second Circuit, the Court below, denying a Petition for a rehearing in banc is dated April 22, 1985 (Exhibit B). The jurisdiction of this Court is invoked, made and conferred under 28 U.S.C. 1254(1). See also Supreme Court Rule 20(4).

STATEMENT OF THE CASE

CASTALDI, originally indicted with regard to a prior separate and distinct narcotic conspiracy was tried before the Hon. MORRIS B. LASKER, convicted and sentenced to a five year term in the federal penitentiary.

Due to this indictment, no returns were filed for the years 1981 and 1982. Statements were submitted and receipted by the Internal Revenue Service with regard to CASTALDI's claim of his Fifth Amendment based in part upon *Garner v. U.S.*, 424 U.S. 648 (1976) for his reasons for not filing.

Subsequently, the present indictment, a narcotic conspiracy, 21 U.S.C. 846 arose solely based on cryptic wired conversations among the other defendants and four con-

versations in which CASTALDI participated. The latter conversations occurred (1) October 17, 1982; (2) October 21, 1982; (3) November 11, 1982 and (4) November 22, 1982. In regard to the alleged meaning of the conversations, which never could be deemed to have directly involved the alleged conspiracy, the Government relied on the testimony of one, HENDLEY, a Special Agent of the Drug Enforcement Administration, who interpreted the alleged general secondary meanings of the argot utilized by narcotic co-conspirators in conversing with each other.

At the date fixed for sentencing May 1, 1984, an issue arose pertaining to the probation report with regard to a co-defendant named Tufaro, wherein the Government alleged that the latter attempted to "help" Castaldi in the prior case by attempting to induce a key witness to recant incriminating testimony.

It should be noted that in the conversation on October 12, 1982, between the other defendants interpreted as pertaining to this conspiracy it was stated:

> "F.P. Oh, I thought maybe Denise told you something.
>
> D.T. No, no, no.
>
> Well, he's suppose to try and do something for him today."

The October 21, 1982 conversation transcript between MARRAZZO and CASTALDI states:

> "R.M. Ah, we met that girl that you were supposed to go on a date with.
>
> W.C. Yeah.
>
> R.M. And he's going to get back to us—a—in three or four days.

It would appear that Judge Knapp solely on this conversation about girls, solely based on its interpretation by a Drug Enforcement Agent, held the Geaney standard satisfied. *See U.S. v. Geaney,* 417 F.2d 1116 (2d Cir., 1969) Cert. den. 397 U.S. 1028 (1970). It should be noted that Judge Knapp originally stated "Looking back on my youth I'd hate to be convicted every time I complained of a girl friend not showing up." He also indicated that with regard to Pagano there existed a perfectly logical non-narcotic reason for association between them. Moreover, at the time Judge Knapp made this ruling, he was unaware of the allegation that Tufaro was attempting to assist Castaldi with regard to his prior conviction.

It must be observed that based on the distressingly thin evidence in this case, it is very likely that the jury substituted the opinions of HENDLEY for its own process of reasonable inference for the objective actions of CASTALDI.

A jury is not required to eliminate all factual hypothesis inconsistent with guilt. There comes a point, however, where reasonable inference gives way to speculation and conjecture and alternative hypothesis become too plausible to permit a reasonable jury to reject them beyond a reasonable doubt.

No evidence exists in this case of prior arrangements between CASTALDI and the other defendants and neither pre-recorded money nor any drugs or drug paraphernalia was ever found on CASTALDI. No evidence exists that CASTALDI possessed heroin or was involved in any drug transaction with regard to the extant conspiracy.

The overt acts specifically relevant to CASTALDI were two telephone calls, i.e., October 17, 1982 and Oc-

tober 21, 1982 where girls were mentioned—specifically one referred to as Denise.

Thus, in order to buttress its apparent weak case the Government at summation referred to income reflected on the 1979 ($22,000.) and 1980 ($63,000.) of income from other sources, i.e., miscellaneous, as being sinister (not in issue here). The Prosecutor added that CASTALDI's failure to file returns for 1981 and 1982 was due to the fact that he was trying to hide an illegitimate source of income. CASTALDI was thus forced to pay the penalty for the exercise of his constitutional privilege against self-incrimination. The right became unprotected and rendered meaningless.

This followed argument of the fact that CASTALDI for 1981 and 1982 submitted a letter to the Internal Revenue Service stating that based upon *Garner v. U.S.*, 424 U.S. 648 (1976) and his rights under the Constitution of the United States, that he has not filed a return and opted not to file these returns.

The Government admitted that one may have a Fifth Amendment claim against filing a return. This must be claimed by filing a "return" (Form 1040 in substance), claiming the privilege attempting to exalt impossible form over substance.

The Court initially on February 7, 1984 ruled that there would be no difference how the fact of non-filing was transmitted to the Internal Revenue Service. The Government rejoined ". . . In all candor your Honor, I cannot stand up there and show a jury that anybody is taking the Fifth Amendment on an issue like that."

Subsequently at the next session, February 8, 1984, the Court ruled that:

> "Apparently the law is clear that the only valid way you can do that is to assert it on your return. So that it is an invalid assertion over privilege."
>
> "So the rule is that if the defendants show they have valid extensions, the Government will just say there is no subsequent return filed for the simple reason that the defendants have not been required to file. If they don't the Government will make whatever argument they want to make.

This was in spite of IRS Notice 609 which specifically provides:

> "Our legal right to ask for information is Internal Revenue Code, §6001 and 6011 and their regulations. They say that you msut file a return or *statement* with us for any tax you are liable for. Code §6109 and its regulations say that you must show your social security number on what you file. This is so we know who you are and can process your return and papers.
>
> You must fill in all parts of the tax form that apply to you. But you do not have to check the boxes for the presidential election campaign fund.
>
> We ask for tax return information to carry out the Internal Revenue Laws of the United States. We need it to figure and collect the right amount of tax.
>
> We may give the information to the Department of Justice and to other Federal agencies, as provided by law. We may also give it to states, the District of Columbia, and U.S. Commonwealths or possessions to carry out their tax laws. We may give it to foreign governments because of tax treaties they have with the United States."

It must be deemed that the controversy in Court solely surrounded the nature of the writing required to proper-

ly claim one's Fifth Amendment rights with regard to income taxes and it was determined that it must be accomplished exclusively via Form 1040, which would never be considered a return.

REASONS FOR GRANTING THE PETITION

1. There is presented to this Court the problem of how to resolve the Sixteenth Amendment to the Constitution to enact and enforce income tax laws and the fundamental right of silence guaranteed by the Fifth Amendment to the Constitution.

2. Antonymous to prior rulings of this Court, it is now required that a ritualistic formula is required to invoke the privilege guaranteed by the Fifth Amendment to the Constitution.

3. Whether solely on an interpretation by a Government Agent of a conversation involving a defendant, the hearsay exception to the Rule of Evidence for admission of alleged co-conspiratorial statements can be satisfied.

POINT I

In this prosecution for a Narcotics Conspiracy, i.e., 21 U.S. Code §812, 841(a)(1), 841(b)(1)(A) and 846, was petitioner's right of silence under the Fifth Amendment to the United States Constitution violated when the trial court ruled that the Government could introduce evidence of petitioner's failure to file income tax returns for specific years, notwithstanding uncontroverted evidence that petitioner for these years delivered a written statement to the Internal Revenue Service that he is claiming the right of silence (Fifth Amendment) in respect to the non-filing of these returns?

The Fifth Amendment written with the inquisitorial practices of the Star Chamber squarely in mind, provides that,

"No person . . . shall be compelled to be a witness against himself."

The privilege protects against the use of compelled statements as well as guarantees the right to remain silent absent immunity.

There exists historically and constitutionally a guaranteed right of a defendant or potential defendant to remain completely silent requiring the State to prove its case without any assistance of any kind from the defendant himself *Williams v. Florida,* 399 U.S. 78, 108, 90 S.Ct. at 1909.

Permitting the Government to introduce evidence regarding failure to file returns, which upon the record Internal Revenue had direct notice was due to a valid Fifth

Amendment claim, comes within the confines of the rule that references pertaining to a Fifth Amendment claim is impermissible.

Although *Miranda* warnings are not applicable to the facts herein, (see *Doyle v. Ohio,* 426 U.S. 610 (1976)) the assertion in a statement to the Internal Revenue Service, [relying on *Garner v. U.S.*, 424 U.S. 648, 96 S.Ct. 1178, 47 L.Ed. 2d 370 (1976) in which the Court held that disclosure made on tax returns were not "compelled incriminations" and as was made clear in *U.S. v. Sullivan,* 274 U.S. 259, 263-264, 47 S.Ct. 607, 71 L.Ed. 1037 (1927), the right to make a valid claim of privilege even as to the amount of the taxpayer's income, as well as any other item on the return which could legitimately cause self-incrimination,] that due to his Fifth Amendment rights no return was being filed, it must be deemed fundamentally unfair and a deprivation of due process to permit this fact that no returns were filed to be offered at trials. If comment on a Fifth Amendment claim is permitted, the insurance in the Constitution as to the right to remain silent is empty and dishonest.

An examination of the facts of this case reveals CASTALDI did assert the privilege at the time a return was due and did so while facing a real and appreciable hazard of prosecution with regard to his indictment for conspiracy. In addition, there is little doubt that a truthfully completed tax return, stating his gross income, would have provided "a lead or clue to evidence having a tendency to incriminate." See *Hoffman v. U.S.*, 341 U.S. 479, 486 (1951); *U.S. v. Neff,* 615 F.2d 1235 (9th Cir. 1980); *Garner v. U.S.*, 424 U.S. 648, 662 (1976). Further, the latter at page 649 n3 specifically identified that the claims of privilege considered therein were only those

justified by a fear of self incrimination other than under the tax laws.

This Court in *Garrity v. New Jersey,* 385 U.S. 493 (1967), concluded that the exercise of a constitutional right may not be conditioned by the exaction of a price. This case has caused CASTALDI to pay the penalty of having comment made in a criminal prosecution of his exercise of his constitutional privilege against self-incrimination.

POINT II

From the Government's position in this case unless the right of silence is asserted in a tax form, the right of silence is forfeited.

As stated in *Hostetter v. Idlewild Liquor Corp.,* 377 U.S. 324 at page 332:

> Both the Twenty-First Amendment and the Chambers clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interest at stake, in any concrete case.

Basically the petitioner in his notification to the Internal Revenue Service clearly relied on the right of silence. Regardless of the color, size of paper, or the form, the assertion was made that the petitioner clearly relied on the right of silence. Consequently, the ruling of the Court below is contrary to the holding in *Quinn v. U.S.,* 349 U.S. 155 (1955) at pp. 162, 163, that there is no prescribed litany to claim the privilege against self incrimination and that if objection based on that right is made in any

language, the addressee can reasonably be expected to understand the response to be an attempt to invoke the right of silence. "As everyone agrees, no ritualistic formula is necessary to invoke the privilege" at page 164.

The Government's summation to the jury to the effect that the petitioner did not file the required tax forms was not a true reflection of the omission. The point of the prosecution's summation was that a narcotic's trafficker or a participant in a narcotics conspiracy would omit filing a tax return to avoid paying taxes as well as not divulging the illegitimate source of the illicit income. In other words the effect of this was that the petitioner was exercising his right of silence and that implied consciousness of guilt. This argument of course can be made as to anybody who claims the Fifth Amendment right of silence.

In *U.S. v. Barnes,* 604 F.2d 121 (2nd Cir. 1979) Cert. Den. 446 U.S. 907. Barnes and his associates did pay taxes and the Government utilized this divulgence to prove guilt. In this case the Government utilized the Petitioner's fundamental Constitutional right to imply that an exercise of it is consciousness of guilt or guilt itself. Unlike Barnes, the Petitioner did not file a return because he fully revealed in a statement to the Government, he was relying on the Fifth Amendment right of silence.

Therefore, it was prejudicial to the Petitioner for the Government to utilize the Petitioner's reliance on a fundamental Constitutional right.

Based on the indictment, there was nothing for the Petitioner to do but to assert explicitly the Fifth Amendment right of silence in regard to the IRS. Petitioner was faulted because the right was not claimed on a Form 1040 but on a separate piece of paper.

This Court has already in *Quinn v. U.S., supra,* held that there is no talismanic formula for asserting the Fifth Amendment right of silence.

As stated in *Brooks v. Tennessee,* 406 U.S. 605 at 609:

> . . . "the rule is an impermissible restriction on the Defendant's right against self-incrimination, to remain silent unless he chooses to speak in the unfettered exercise of his own will and to suffer no penalty . . . for such silence. . . ." (Omitting internal quotations and citations).

See also *Minnesota v. Murphy,* __U.S.__, 104 S.Ct. 1136, I (1984), page 1143, being stated in part that . . . "nothing in our prior cases suggests that the incriminating nature of a question by itself, excuses a timely assertion of the privilege. . . ."

In this case the Petitioner in writing asserted the privilege at the relevant time. The privilege was not obliterated because it wasn't on a tax form. There is no requirement in the Constitution of the United States that the right of silence has to be manifested by a particular writing or any writing at all. But in this case, the Petitioner did notify the Government in writing about the assertion of the right. He was faulted for using the wrong kind of form.

The prosecutor's summation at trial was commentary of the Defendant's exercise of silence or non-disclosure to the Government as consciousness of guilt or a failure to account for his acts which the Government claimed were participation in narcotics conspiracy. This was not the fact.

It is contended, therefore, evidence and commentary on the Petitioner's failure to file Form 1040 was an important component of the case that went to the jury.

POINT III.

No evidence tending to show Castaldi's knowing participation in the conspiracy was established.

Numerous telephone conversations between Marrazzo and Castaldi related to gambling, i.e., point spread, specifically identifiable teams on playing dates, etc. Although four direct conversations of Castaldi were attempted to be used by the Government to show Castaldi's participation in this conspiracy, only two, October 17 and 21, 1982, making reference to girls, were deemed by the Judge to satisfy the Geaney Standard. See *U.S. v. Geaney, supra.* This was solely based on an interpretation by a Drug Enforcement Agent asserting that girls represent narcotics and despite the judge's observation that "looking back on my youth I'd hate to be convicted every time I complained of a girlfriend not showing up."

Solely based on this conversation interpretation by the Drug Enforcement Agent, Judge Knapp ruled the Geaney Standard satisfactory. See *U.S. v. Geaney,* 417, F2d 1116 (2d Cir. 1969) cert. den. 397 U.S. 1028 (1970). This inference is not supported by competent proof.

It should be noted that after conviction the Government alleged during sentencing, that Tufaro was attempting to induce a key witness to recant incriminating testimony with regard to Castaldi's first conviction. It must be presumed that this item first revealed at sentencing was not made known to the Grand Jury, Drug Enforcement Agent or to Judge Knapp and was known by the prosecutor prior to trial.

Given that "a conspiracy by its very nature is a secretive operation," *U.S. v. Provenzano,* 615 F2d 37, 45 cert. den. 446 U.S. 953 (1980) the existence and participation in a conspiracy . . . may be established . . . through circumstantial evidence. *U.S. v. Sanzo,* 673 F2d 64, 69 (2d cir.) cert. den. 103 S.Ct. 128 (1982).

The most significant circumstance relied upon by the Government on the jury's finding of guilt is the fact that girls were mentioned in conversations, which a Drug Enforcement Agent stated was a code word for narcotics. Evidence tending to show knowing participation in the conspiracy is required. *U.S. v. Bulman,* 667 F2d 1374, 1377-78 (11th Cir.) cert. den. sub. nom *Howard vs. U.S.,* 456 U.S. 1010 (1982).

There was no showing of purposeful behavior tending to connect Castaldi with the acquisition, concealment, importation, use or sale of drugs. Participation cannot be proven merely by a telephone conversation, reliance that its basis related to drugs can only be inferred by a proposed interpretation via a Drug Enforcement Agent. It is unknown if the latter was aware of the alleged attempt made known at sentencing that Tufaro was involved in an effort to induce a key witness to recant incriminating testimony concerning Castaldi's prior conviction. This would eliminate an unfounded prosecution if this conversation could have been deemed to be connected with the latter rather than the narcotic conspiracy. Thus exculpatory or no criminal liability with regard to this conspiracy could be found.

The jury may have given undue weight to the expert opinion of the Drug Enforcement Agent that the conversation pertaining to girls could only have meant narcotics when it was subsequently alleged that a different illegal

act, solely known to the Government, was occurring simultaneously between Tufaro and Castaldi. The distressingly thin evidence that constitutes the balance of this case would appear to confirm the fact that the jury substituted the opinion of the Drug Enforcement Agent for its own process of reasonable inference from the objective actions of the Defendant.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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APPENDIX A—Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 22nd day of April one thousand nine hundred and eighty-five.

UNITED STATES OF AMERICA,

Appellee,

v.

DOMINIC TUFARO, a/k/a "Donnie Boy Clouseau," RONALD MARRAZZO, a/k/a "Ronald Martin," FREDERICK SINDONA, a/k/a "Freddy," and WILLIAM CASTALDI, a/k/a "Willy,"

Defendants-Appellants.

ORDER 84-1158, 84-1166, 84-1171, 84-1184
UNITED STATES COURT OF APPEALS
FILED
APR 22 1985
ELAINE B. GOLDSMITH, CLERK
SECOND CIRCUIT

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendants-appellants Dominic Tufaro and Ronald Marrazzo.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

s/ Elaine B. Goldsmith
Elaine B. Goldsmith
Clerk

APPENDIX B—Opinion of the United States Court of Appeals for the Second Circuit Affirming Convictions

UNITED STATES COURT OF APPEALS
For the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the day of , One Thousand Nine Hundred and Eighty- .

PRESENT:
HON. ELLSWORTH A. VAN GRAAFEILAND,
HON. LAWRENCE W. PIERCE,
HON. GEORGE C. PRATT,
Circuit Judges.

UNITED STATES OF AMERICA,
Appellee,

v.

DOMINIC TUFARO, a/k/a "Donnie Boy Clouseau," RONALD MARRAZZO, a/k/a "Ronald Martin," FREDERICK SINDONA, a/k/a "Freddy," and WILLIAM CASTALDI, a/k/a "Willy,"
Defendants-Appellants.

ORDER 84-1158, 84-1166, 84-1171, 84-1184
UNITED STATES COURT OF APPEALS
FILED
MAR 5, 1985
ELAINE B. GOLDSMITH, CLERK
SECOND CIRCUIT

These are appeals from judgments of conviction entered in the United States District Court for the

Southern District of New York (Knapp, J.) on May 1, 1984 and May 14, 1984. At the conclusion of an eight-week trial, a jury found appellants Dominic Tufaro, Ronald Marrazzo, Frederick Sindona and William Castaldi, guilty of conspiring to distribute and possess with intent to distribute heroin. 21 U.S.C. §846. In addition, Tufaro and Marrazzo were found guilty of distributing and possessing with intent to distribute heroin and conspiring to invest and reinvest proceeds of their joint criminal activities in a racketeering enterprise. 21 U.S.C. §841, 18 U.S.C. §1962(d). The jury also found Tufaro guilty of organizing, supervising and managing a continuing criminal enterprise in narcotics. 21 U.S.C. §848.

Appellants contend that the district court erred in denying their pretrial motions to suppress evidence secured by means of court-authorized wiretaps. They premise this argument on alleged deficiencies in the Government's application for the first wiretap order issued by District Judge Mark Costantino, which authorized the tapping of the telephone of one-time defendant Frank Pasqua, Jr., who pled guilty before trial. Because subsequent electronic surveillance orders were based primarily on information obtained through the Pasqua wiretap, appellants assert that all the evidence obtained against them through electronic eavesdropping was tainted by the allegedly deficient Pasqua tap and should have been suppressed. This contention is without merit.

The Government submitted the affidavit of Special F.B.I. Agent Robert J. Liberatore in support of its application for the Pasqua wiretap. The affidavit set forth information provided by three confidential informants, identified as Sources A, B and C. Source B, the most informative source, had dealt with appellants for a period of

two years, during which time he learned that Tufaro and Marrazzo operated a large scale heroin distribution organization. According to the affidavit, Pasqua "had told Source B that his work for Dominic Tufaro and Ronald Marrazzo include[d] receiving quantities of heroin from Tufaro and/or Marrazzo, delivering the heroin to distributors in Manhattan, Brooklyn and Queens, and returning to Tufaro and Marrazzo the proceeds which he pick[ed] up from the heroin distributors." The affidavit stated further that Pasqua often used his telephone to relay messages to Tufaro and Marrazzo and to arrange narcotics transactions and that Source B, himself, had discussed Pasqua's narcotics business with him over the telephone on several occasions, during one of which an F.B.I. agent was present. The affidavit also discussed that the telephone records of Pasqua's local and long distance calls reflected a pattern of calls to a telephone located at an apartment in Scarsdale, New York where Marrazzo received mail.

When the Pasqua wiretap application is viewed in a "practical, nontechnical" fashion, *Illinois v. Gates,* 103 S. Ct. 2317, 2328 (1983); *United States v. Travisano,* 724 F.2d 341, 346 (2d Cir. 1983), there can be no doubt that Source B's information provided Judge Costantino with a substantial basis for concluding that narcotics offenses had been and were being committed by the defendants and that information concerning such offenses would be obtained through a wiretap of Pasqua's telephone. *Illinois v. Gates, supra,* 103 S.Ct. at 2331. Although the Liberatore affidavit contained a somewhat general description of Source B's track record of reliability, this was not fatal to the Government's application. The affidavit contained other indicia of Source B's reliability, *id.* at 2329, and an informant's past record of reliability is not "an independent requirement[ ] to be rigidly exacted in every cast," *id.*

at 2327-28.

Appellants also contend that the Government's application for the Pasqua wiretap was deficient because the Liberatore affidavit failed to establish that normal investigative techniques, short of electronic surveillance, had failed or were unlikely to succeed. We disagree. "An affidavit describing the standard techniques that have been tried and facts demonstrating why they are no longer effective is sufficient to support an eavesdropping order even if every other possible means of investigation has not been exhausted." *United States v. Terry,* 702 F.2d 299, 310 (2d Cir.), *cert. denied,* 104 S.Ct. 482 (1983); *see United States v. Vazquez,* 605 F.2d 1269, 1282 (2d Cir. 1979), *cert. denied,* 444 U.S. 981, 1019 (1980); *United States v. Hinton,* 543 F.2d 1002, 1011 (2d Cir.), *cert. denied,* 429 U.S. 980 (1976). The Liberatore affidavit adequately informed Judge Costantino of the difficulties inherent in the use of normal law enforcement methods.

The district court did not err in denying appellants' requests for a *Franks* hearing on alleged misstatements and omissions in the Pasqua wiretap application. *See Franks v. Delaware,* 438 U.S. 154 (1978). Under *Franks,* a hearing is required only where a defendant makes a "substantial preliminary showing" that the affidavit contains inaccuracies resulting from the affiant's "deliberate falsehood or . . . reckless disregard of the truth." *Id.* at 170-71. Moreover, a *Franks* hearing is appropriate only "if the allegedly false statement is necessary to the finding of probable cause." *Id.* at 156; *see United States v. Marin-Buitrago,* 734 F.2d 889, 895 (2d Cir. 1984). It is clear from the record that Agent Liberatore did not deliberately lie or recklessly misrepresent the truth in his affidavit and that any misstatement or omission that arguably might have existed was not material to Judge Costantino's finding of

probable cause.

There is no merit in appellant Tufaro's challenge of his conviction for organizing, supervising and managing a continuing criminal enterprise in narcotics. 21 U.S.C. §848. Violations of §843(b) can constitute predicates for a section 848 charge. *United States v. Webster,* 639 F.2d 174, 181 (4th Cir. 1981), *modified on other grounds,* 669 F.2d 185 (4th Cir.), *cert. denied,* 454 U.S. 857 (1982). This is so even though such violations are not charged separately in the indictment if, as was the case here, the indictment gave the defendant ample notice of the charges against him. *United States v. Sperling,* 506 F.2d 1323, 1344 (2d Cir. 1974), *cert. denied,* 420 U.S. 962 (1975); *see also United States v. Martinez-Torres,* 556 F.Supp. 1255, 1271-72 (S.D.N.Y.), *aff'd on other grounds sub nom., United States v. Calvente,* 722 F.2d 1019 (2d Cir. 1983). Tufaro suffered no prejudice from the prosecutor's submission to the jury of a list containing several predicate offenses that were not charged in the indictment.

The district court did not plainly err in failing to instruct the jury that its verdict had to be unanimous with respect to the identities of the five or more persons supervised by Tufaro. *United States v. Raffone,* 693 F.2d 1343, 1347-48 (11th Cir. 1982), *cert. denied,* 103 S. Ct. 2084 (1983). It did not err at all in admitting the declarations of co-conspirators against Sindona and Castaldi. Independent nonhearsay evidence established "a likelihood of an illicit association" between the declarants and Sindona and Castaldi, *United States v. Cicale,* 691 F.2d 95, 103 (2d Cir. 1982), *cert. denied,* 103 S. Ct. 1771 (1983), and the declarations of the co-conspirators were made in the course of, and in furtherance of, the conspiracy, *United States v. Geaney,* 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied,* 397 U.S. 1028 (1970).

Although appellants assert numerous other grounds for reversal, we feel no need to address them herein. Suffice it to say that we have reviewed them carefully and found them to be either without support in the law or without support in the record.

Although we affirm all the judgments of conviction, we believe that Tufaro should not have been sentenced on both the conspiracy and continuing criminal enterprise counts. *See United States v. Mourad,* 729 F.2d 195, 202-03 (2d Cir. 1984). We therefore vacate Tufaro's sentence—but not his conviction—on the section 846 conspiracy charged in Count One.

All convictions are affirmed. Tufaro's sentence under 21 U.S.C. §846 is vacated. The mandate shall issue forthwith.

s/ Ellsworth A. Van Graafeiland
Hon. Ellsworth A. Van Graafeiland

s/ Lawrence W. Pierce
Hon. Lawrence W. Pierce.

s/ George C. Pratt
Hon. George C. Pratt

N.B. *Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.*

APPENDIX C—Statutes Cited

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XVI.—INCOME TAX

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

§ 7203. Willful failure to file return, supply information, or pay tax.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or

regulations, shall, in addition to other penalties provided by law, he guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 851.

§ *6020. Returns prepared for or executed by Secretary*

(a) Preparation of return by Secretary.—If any person shall fail to make a return required by this title or by regulations prescribed thereunder, but shall consent to disclose all information necessary for the preparation thereof, then, and in that case, the Secretary may prepare such return, which being signed by such person, may be received by the Secretary as the return of such person.

(b) Execution of return by Secretary.—

(1) Authority of Secretary to execute return—If any person fails to make any return (other than a declaration of estimated tax required under section 6015) required by any internal revenue law or regulation made thereunder at the time prescribed therefor, or makes, willfully or otherwise, a false or fraudulent return, the Secretary shall make such return from his own knowledge and from such information as he can obtain through testimony or otherwise.

(2) Status of returns.—Any return so made and subscribed by the Secretary shall be prima facie good and sufficient for all legal purposes.

Aug. 16 1954, c. 736, 68A Stat. 740; June 28, 1968, Pub.L. 90-364, Title I, § 103(e)(3), 82 Stat. 264; Oct. 4, 1976, Pub.L. 94-455, Title XIX, § 1906(b)(13)(A), 90 Stat. 1834.

§ *7602. Examination of books and witnesses.*

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.
Aug. 16, 1954, c. 736, 68A Stat. 901.

§ *7604. Enforcement of summons.*

(a) Jurisdiction of district court.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance,

testimony, or production of books, papers, records, or other data.

(b) Enforcement.—Whenever any person summoned under section 6420(e) (2), 6421(f) (2), 6424(d) (2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

(c) Cross references—

(1) Authority to issue orders, processes, and judgments.

For authority of district courts generally to enforce the provisions of this title, see section 7402.

(2) Penalties.—

For penalties applicable to violation of section 6420(e) (2), 6421(f) (2), 6424(d) (2), or 7602, see section 7210.

Aug. 16, 1954, c. 736, 68A Stat. 902; Apr. 2, 1956, c. 160, § 4(i), 70 Stat. 91; June 29, 1956, c. 462, Title II, § 208(d)

(4), 70 Stat. 396; June 21, 1965, Pub.L. 89-44, Title II, § 202(c) (4), 79 Stat. 139.

§ *812. Schedules of controlled substances*

Establishment

(a) There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. The schedules established by this section shall be updated and republished on a semiannual basis during the two-year period beginning one year after October 27, 1970 and shall be updated and republished on an annual basis thereafter.

Placement on schedules; findings required

(b) Except where control is required by United States obligations under an international treaty, convention, or protocol, in effect on October 27, 1970, and except in the case of an immediate precursor, a drug or other substance may not be placed in any schedule unless the findings required for such schedule are made with respect to such drug or other substance. The findings required for each of the schedules are as follows:

(1) Schedule I.—

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has no currently accepted medical use in treatment in the United States.

(C) There if a lack of accepted safety for use of the drug or other substance under medical supervision.

(2) Schedule II.—

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions.

(C) Abuse of the drug or other substances may lead to severe psychological or physical dependence.

(3) Schedule III.—

(A) The drug or other substance has a potential for abuse less than the drugs or other substances in schedules I and II.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence.

(4) Schedule IV.—

(A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule III.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule III.

(5) Schedule V.—

(A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule IV.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule IV.

Initial schedules of controlled substances

(c) Schedules I, II, III, IV, and V shall, unless and until amended pursuant to section 811 of this title, consist of the following drugs or other substances, by whatever official name, common or usual name, chemical name, or brand name designated:

Schedule I

(a) Unless specifically excepted or unless listed in another schedule, any of the following opiates, including their insomers, eaters, ethers, salts, and salts of isomers, esters, and ethers, whenever the existence of such isomers,

esters, ethers, and salts is possible within the specific chemical designation:

(1) Acetylmethadol.
(2) Allylprodine.
(3) Alphacetylmathadol.
(4) Alphameprodine.
(5) Alphamethadol.
(6) Benzethidine.
(7) Betacetylmethado..
(8) Betameprodine.
(9) Betamethadol.
(10) Betaprodine.
(11) Clonitazene.
(12) Dextromoramide.
(13) Dextrorphan.
(14) Diampromide.
(15) Diethylthiambutene.
(16) Dimenoxadol.
(17) Dimepheptanol.
(18) Dimethylthiambutene.
(19) Dioxaphetyl butyrate.
(20) Dipipanone.
(21) Ethylmethylthiambutene.
(22) Etonitazene.
(23) Etoxeridine.
(24) Furethidine.
(25) Hydroxypethidine.
(26) Ketobemidone.
(27) Levomoramide.
(28) Levophenacylmorphan.
(29) Morpheridine.
(30) Noracymethadol.
(31) Norlevorphanol.
(32) Normethadone.
(33) Norpipanone.

(34) Phenadoxone.
(35) Phenampromide.
(36) Phenomorphan.
(37) Phenoperidine.
(38) Piritramide.
(39) Proheptazine.
(40) Properidine.
(41) Racemoramide.
(42) Trimeperidine.

(b) Unless specifically excepted or unles listed in another schedule, any of the following opium derivatives, their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Acetorphine.
(2) Acetyldihydrocodeine.
(3) Benzylmorphine.
(4) Codeine methylbromide.
(5) Codeine-N-Oxide.
(6) Cyprenorphine.
(7) Desomorphine.
(8) Dihydromorphine.
(9) Etorphine.
(10) Heroin.
(11) Hydromorphinol.
(12) Methyldesorphine.
(13) Methylhydromorphine.
(14) Morphine methylbromide.
(15) Morphine methylsulfonate.
(16) Morphine-N-Oxide.
(17) Myrophine.
(18) Nicocodeine.
(19) Nicmorphine.
(20) Normorphine.

(21) Pholcodine.
(22) Thebacon.

(c) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances, or which contains any of their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) 3,4-methylenedioxy amphetamine.
(2) 5-methoxy-3,4-methylenedioxy amphetamine.
(3) 3,4,5-trimethoxy amphetamine.
(4) Bufotenine.
(5) Diethyltryptamine.
(6) Dimethyltryptamine.
(7) 4-methyl-2,5-dimethoxyamphetamine.
(8) Ibogaine.
(9) Lysergic acid diethylamide.
(10) Marihuana.
(11) Mescaline.
(12) Peyote.
(13) N-ethyl-3-piperidyl benzilate.
(14) N-methyl-3-peperidyl benzilate.
(15) Psilocybin.
(16) Psilocyn.
(17) Tetrahydrocannabinols.

Schedule II

(a) Unless specifically excepted or unless listed in another schedule, any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction

and chemical synthesis:

(1) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate.

(2) Any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in clause (1) except that these substances shall not include the isoquinoling alkaloids of opium.

(3) Opium poppy and poppy straw.

(4) Coca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine.

(b) Unless specifically excepted or unless listed in another schedule, any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters and ethers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation:

(1) Alphaprodine.
(2) Anileridine.
(3) Bezitramide.
(4) Dihydrocodeine.
(5) Diphenoxylate.
(6) Fentanyl.
(7) Isomethadone.

(8) Levomethrophan.
(9) Levorphanol.
(10) Metazocine.
(11) Methadone.
(12) Methadone-Intermediate, 4-cyano-2-dimethylamino-4, 4-diphenyl butane.
(13) Moramide-Intermediate, 2-methyl-3-morpholino-1, 1-diphenylpropane-carboxylic acid.
(14) Pethidine.
(15) Pethidine-Intermediate-A, 4-cyano-1-methyl-4-phenylpiperidine.
(16) Pethidine-Intermediate-B, ethyl-4-phenylpiperidine-4-carboxylate.
(17) Pethidine-Intermediate-C, 1-methyl-4-phenylpiperidine 4-carboxylic acid.
(18) Phenazocine.
(19) Piminodine.
(20) Racemethorphan.
(21) Racemorphan.

(c) Unless specifically excepted or unless listed in another schedule, any injectable liquid which contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers.

Schedule III

(a) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system:

(1) Amphetamine, its salts, optical isomers, and salts of its optical isomers.

(2) Phenmetrazine and its salts.

(3) Any substance (except an injectable liquid) which contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers.

(4) Methylphenidate.

(b) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system:

(1) Any substance which contains any quantity of a derivative of barbituric acid, or any salt of a derivative of barbituric acid.
(2) Chorhexado.
(3) Glutethimide.
(4) Lysergic acid.
(5) Lysergic acid amide.
(6) Methyprylon.
(7) Phencyclidine.
(8) Sulfondiethylmethane.
(9) Sulfonethylmethane.
(10) Sulfonmethane.

(c) Nalorphine.

(d) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation containing limited quantities of any of the following narcotic drugs, or any salts thereof:

(1) Not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with an equal or greater quantity of an iso-

quinoline alkaloid of opium.

(2) Not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(3) Not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with a fourfold or greater quantity of an isoquinoline alkaloid of opium.

(4) Not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(5) Not more than 1.8 grams of dihydrocodeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(6) Not more than 300 milligrams of ethylmorphine per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(7) Not more than 500 milligrams of opium per 100 milliliters or per 100 grams, or not more than 25 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(8) Not more than 50 milligrams of morphine per 100 milliliters or per 100 grams with one or more ac-

tive, nonnarcotic ingredients in recognized therapeutic amounts.

Schedule IV

(1) Barbital.
(2) Chloral betaine.
(3) Chloral hydrate.
(4) Ethchlorvynol.
(5) Ethinamate.
(6) Methohexital.
(7) Meprobamate.
(8) Methylphenobarbital.
(9) Paraldehyde.
(10) Petrichloral.
(11) Phenobarbital.

Schedule V

Any compound, mixture, or preparation containing any of the following limited quantities of narcotic drugs, which shall include one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer upon the compound, mixture, or preparation valuable medicinal qualities other than those possessed by the narcotic drug alone:

(1) Not more than 200 milligrams of codeine per 100 milliliters or per 100 grams.

(2) Not more than 100 milligrams of dihydrocodeine per 100 milliliters or per 100 grams.

(3) Not more than 100 milligrams of ethylmorphine per 100 milliliters or per 100 grams.

(4) Not more than 2.5 milligrams of diphenoxylate and not less than 25 micrograms of atropine sulfate per dosage unit.

(5) Not more than 100 milligrams of opium per 100 milliliters or per 100 grams.

Stimulants or depressants containing active medicinal ingredients; exception

(d) The Attorney General may by regulation except any compound, mixture, or preparation containing any depressant or stimulant substance in paragraph (a) or (b) of schedule III or in schedule IV or V from the application of all or any part of this subchapter if (1) the compound, mixture, or preparation contains one or more active medicinal ingredients not having a depressant or stimulant effect on the central nervous system, (2) such ingredients are included therein in such combinations, quantity, proportion, or concentration as to vitiate the potential for abuse of the substances which do have a depressant or stimulant effect on the central nervous system, and (3) such exception does not conflict with United States obligations under the Convention on Psychotropic Substances. Pub.L. 91-513, Title II, §202, Oct. 27, 1970, 84 Stat. 1247; Pub.L. 95-633, Title I, §103, Nov. 10, 1978, 92 Stat. 3772.

§*841. Prohibited acts A*

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or

dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Penalties

(b) Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisnment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

(B) In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall, except as provided in paragraphs (4), (5), and (6) of this subsec-

tion, be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000 or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine of not more than $10,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine of not more than $20,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than $5,000, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine or not more than $10,000, or both.

(4) Notwithstanding paragraph (1)(B) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in subsections (a) and (b) of section 844 of this title.

(5) Notwithstanding paragraph (1)(B) of this subsection, any person who violates subsection (a) of this section by manufacturing, distributing, dispensing, or possessing with intent to manufacture, distribute, or dispense, except as authorized by this subchapter, phencyclidine (as defined in section 830(c)(2) of this title) shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under paragraph (1) of this paragraph, or for ***

RULE 801—DEFINITIONS

The following definitions apply under this article:

(a) Statement.—A "statement" is (1) an oral or writ-

ten assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) Declarant.—A "declarant" is a person who makes a statement.

(c) Hearsay.—"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay.—A statement is not hearsay if—

(1) Prior statement by witness.—The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him; or

(2) Admission by party-opponent.—The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or

(C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.